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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re N.K. et al., Persons Coming Under the  
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

L.K.,

Defendant and Appellant.

D060979

(Super. Ct. No. J516758A-B)

APPEAL from a judgment of the Superior Court of San Diego County, Laura J.  
Birkmeyer, Judge. Affirmed.

L.K., the mother of N.K. and M.W., appeals the judgment terminating her parental  
rights pursuant to Welfare and Institutions Code<sup>1</sup> section 366.26. L.K. contends the

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

juvenile court erred by not applying the beneficial parent-child relationship exception to adoption (*id.*, subd. (c)(1)(B)(i)) and/or the sibling relationship exception to adoption (*id.*, subd. (c)(1)(B)(v)). L.K. also claims the evidence was insufficient to show the guardians and prospective adoptive parents of N.K. and M.W. were aware of the legal ramifications of adoption in contrast to guardianship. Additionally, L.K. asserts reversal is mandated because of the cumulative effect of the purported errors. We affirm.

## FACTS

In July 2007, the San Diego County Health and Human Services Agency (Agency) filed dependency petitions on behalf of N.K. and M.W. after police found, among other things, a loaded shotgun under the bed on which the girls had been sleeping. N.K. was six years old and M.W. was three years old. The juvenile court sustained the petitions, declared N.K. and M.W. dependents, placed the children with the maternal grandmother and ordered L.K. to comply with the provisions of her reunification plan.

At the six-month review hearing, the court ordered Agency to provide six more months of services to L.K. even though the court found she had not made substantive progress with her case plan. However, during the next review period, L.K. complied with her case plan, and Agency recommended that services continue until the 18-month date. The court followed the recommendation.

At the 18-month review hearing on January 5, 2009, the court found L.K. had not made substantive progress with her case plan, terminated reunification services and scheduled a section 366.26 hearing.

In its report for the section 366.26 hearing, Agency noted that L.K. had maintained regular contact with N.K. and M.W. during their placement with the grandmother. According to the social worker, L.K. "is a big part" of the children's life. "She visits frequently and actively participates in their care," the social worker wrote. "Both girls clearly have a relationship with their mother that is positive in nature."

Agency also reported that the maternal grandmother could no longer provide long-term care for N.K. and M.W. A maternal aunt, however, offered to assume custody of the girls and was willing to adopt them or serve as their guardian. The aunt said she preferred guardianship over adoption because she hoped L.K. would eventually regain custody of the girls by showing the court she had sufficient stability to raise them. After assessing the aunt's home as suitable, Agency placed N.K. and M.W. with the aunt on October 3.

Agency recommended the court order legal guardianship as the girls' permanent plan. In the social worker's opinion, L.K. and the children had a beneficial parent-child relationship, which outweighed the benefits of adoption (§ 366.26, subd. (c)(1)(B)(i)). On February 16, 2010, the court adopted Agency's recommendation. The court appointed the aunt and her adult son, who resided with her, as the girls' guardians. The court ordered reasonable visitation for L.K, with the guardians determining the time, place, manner, frequency and length of the visits.<sup>2</sup>

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<sup>2</sup> Also, in February 2010, L.K. gave birth to another daughter, L.W. L.W. is not a subject of this appeal.

During the next six months, the guardians and other maternal relatives frequently disagreed about the care of N.K. and M.W. The aunt complained that the girls exhibited inappropriate behavior after visits with the maternal relatives. The aunt was concerned the girls were not properly supervised during visits. Agency advised the aunt to supervise visits between the children and L.K. as well as the girls' visits with other maternal relatives. The aunt also insisted the maternal relatives employ the same discipline structure as the aunt did at home.

At the postpermanency review hearing on August 19, the court adopted Agency's recommendation that N.K. and M.W. remain under the guardianship of their aunt and her son. However, the court set a hearing for October 28—two months rather than the usual six months—for an update on whether the maternal relatives were abiding by the visitation orders and aunt's rules.

At the October 28 hearing, Agency reported that L.K.'s visitation with the girls had significantly decreased. L.K. had visited N.K. and M.W. only three times over the preceding two months. Visits between the girls and other maternal relatives had also decreased. N.K. and M.W. exhibited less negative behavior during this period and were performing better in school.

Agency also reported the guardians wanted to pursue adoption of the girls. The guardians changed their minds about adoption because L.K. had demonstrated inconsistency and instability during the past year, which had a negative impact on the girls. However, during the past months, the girls' behavior had markedly improved as the influence of L.K. and other relatives had decreased. The guardians decided they wanted

to provide N.K. and M.W. with a permanent, stable and loving home. Agency recommended the girls' permanent plan be changed and requested a section 366.26 hearing be scheduled to consider adoption as the permanent plan.

At the December 7 postpermanency review hearing, the court found that N.K. and M.W.'s permanent plan of guardianship might no longer be appropriate and that adoption might be a more appropriate permanent plan. The court scheduled a section 366.26 hearing.

In February 2011, the social worker began supervising L.K.'s visits with the girls because the aunt was no longer willing to allow L.K. in her home. A heated verbal argument had ensued when L.K. went to the aunt's home to style N.K.'s hair on the day she was to take part in a school performance. The aunt had told L.K. beforehand there would not be enough time to do so on the day of the performance. When L.K. arrived, she told N.K. that she would style her hair, but the aunt intervened. N.K. and M.W. became upset. According to the aunt, the girls' behavior regressed after the incident.

L.K. was late to the first two visits supervised by the social worker. N.K. and M.W. were excited to spend time with their baby sister, now one year old. (See fn. 2, *ante*.) During the first visit, L.K. brought cupcakes for the baby's birthday and valentine gifts. N.K. showed L.K. her multiplication tables. During the second visit, L.K. brought fruit and coloring activities. M.W. had a difficult time separating from L.K. at the end of the visit.

L.K. had one supervised visit in March and one in April. But there was not another supervised visit between L.K. and the girls until August 25. L.K., however, claimed she saw the girls every other week at family gatherings.

At the contested section 366.26 hearing on November 16, the court found N.K. and M.W. were likely to be adopted if parental rights were terminated and none of the statutory exceptions to adoption applied. The court terminated L.K.'s parental rights to N.K. and M.W. and ordered adoption as the children's permanent plan.

## DISCUSSION

### *I. Beneficial Parent-Child Relationship Exception to Adoption*

L.K. contends the juvenile court erred by not applying the beneficial parent-child relationship exception to terminating parental rights and adoption. (§ 366.26, subd. (c)(1)(B)(i).)

Adoption is the permanent plan preferred by the Legislature. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) At the selection and implementation hearing, the juvenile court must terminate parental rights if the child is likely to be adopted within a reasonable time unless one of the statutory exceptions applies. (§ 366.26, subd. (c)(1).) Section 366.26, subdivision (c)(1)(B)(i), provides an exception to termination of parental rights when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." The exception applies only if both prongs are met. The parent bears the burden to establish by a preponderance of the evidence that an exception to the statutory preference for adoption applies. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.)

Our standard of review is the substantial evidence test. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) We determine if there is substantial evidence, contradicted or uncontradicted, to support the conclusions of the juvenile court, resolving all conflicts favorably to the prevailing party, and drawing all legitimate inferences to uphold the lower court's ruling. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.)

Substantial evidence supports the juvenile court's finding that L.K. had not maintained regular contact with N.K. and M.W. Although L.K. had frequent—sometimes daily—contact with N.K. and M.W. in the early periods of the case while the children were placed with the maternal grandmother, by early 2009, L.K.'s contact with the girls had lessened.

The court placed the children in the aunt's home in October 2009 and named her and her son as the children's guardians in February 2010. The guardians' attempts to provide structure to the girls' lives were undermined by L.K. and other maternal relatives over the next several months until Agency advised the aunt to allow only supervised visits. At that point, the number of L.K.'s visits decreased markedly. From September 2010 to February 2011, L.K. visited N.K. and M.W. only once or twice a month, including visits at family gatherings.

After the heated exchange between L.K. and the aunt in February 2011, L.K. had only four supervised visits until August 25. Although L.K. testified she had visits every other week with N.K. and M.W. at family gatherings during this period, there was no documentation of those visits. During the last two years of this case, L.K.'s contact with N.K. and M.W. was minimal.

As the court conceded, the issue of regular contact was a close call. Nonetheless, even were we to conclude substantial evidence did not support the court's finding that L.K. had insufficient contact with the girls to meet the first prong of section 366.26, subdivision (c)(1)(B)(i), the juvenile court found L.K. did not satisfy the second prong of the statute—namely, showing that N.K. and M.W. would benefit from continuing their relationship with L.K. That showing requires more than frequent and loving contact, an emotional bond with the child, pleasant visits or incidental benefit to the child. (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) To overcome the statutory preference for adoption, a parent must prove that he or she occupies a parental role in the child's life, resulting in a significant, positive emotional attachment of the child to the parent. (*Ibid.*; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

In *In re Autumn H.*, *supra*, 27 Cal.App.4th at page 575, this court explained that to come within the beneficial parent-child relationship exception to adoption, a parent must show the "relationship promotes the well-being of the child to such a degree as to *outweigh* the well-being the child would gain in a permanent home with new, adoptive parents." (Italics added.) The court must balance "the strength and quality of the . . . parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid.*) The court's balancing test must be performed on a case-by-case basis, taking into account variables, including "[t]he age of



the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs . . . ." (*Id.* at pp. 575-576.) We affirmed this balancing test, explaining the standard "reflects the legislative intent that adoption should be ordered unless *exceptional circumstances* exist . . . ." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51, italics added.)

Substantial evidence supported the court's finding that L.K. had not demonstrated N.K. and M.W. would benefit from continuing their relationship with her. L.K. had to do more than show an emotional bond with them or that their visits were pleasant. (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108.) L.K. had to show she occupied a parental role in N.K.'s and M.W.'s lives. (*Ibid.*; see also *In re Teneka W.* (1995) 37 Cal.App.4th 721, 728.) L.K. did not make that showing.

After the court placed N.K. and M.W. with their aunt and her son, L.K. as well as other maternal relatives repeatedly interfered and undermined the stability the aunt was attempting to establish in the family household. As a result, N.K. and M.W. displayed behavioral problems, including defiance and aggression. The children's poor behavior improved only after the aunt, with the concurrence of the Agency, insisted visits be supervised with the same discipline structure she employed. Rather than occupying a parental role, L.K. had assumed a largely disruptive one. Furthermore, in the final 18 months of the case, the number of L.K.'s visits with N.K. and M.W. decreased drastically, and her visitation remained supervised. Parents who have not advanced beyond supervised visitation have a difficult time establishing the beneficial parent-child relationship exception. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.)

We acknowledge that in February 2010, the juvenile court found the benefits of maintaining the relationship between L.K. and N.K. and M.W. outweighed the benefits of adoption. But circumstances had changed dramatically by November 2011. N.K. and M.W. had been living with their guardians for more than two years and were bonded to them. Moreover, the girls had blossomed under the stability provided by the guardians. The girls were well behaved and were performing much better in school. On the few occasions when L.K. visited N.K. and M.W., the girls separated easily from her.

At the selection and implementation hearing, the juvenile court's foremost concern is the child's interest in stability and permanency. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418.) "The purpose of section 366.26 is to select a permanent plan for a child who cannot return home because reunification efforts have failed." (*Ibid.*) L.K. did not overcome the problems underlying N.K. and M.W.'s dependency in the 18 months allotted to her for reunification. L.K. did not demonstrate during the following 21 months of the guardianship that she could assume a parental role, and the once strong bond between her and the girls had largely dissipated. L.K. did not establish that severing what remained of this bond in favor of "the security and the sense of belonging" provided by an adoptive family would harm the girls. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.) Simply put, the benefits of the relationship between L.K. and N.K. and M.W. did not "outweigh the well-being [the girls] would gain in a permanent home with new, adoptive parents." (*Ibid.*) A dependent child should not be made to wait indefinitely for her mother to become an adequate parent. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.)

## II. *Sibling Relationship Exception to Adoption*

L.K. contends the juvenile court erred by not applying the section 366.26, subdivision (c)(1)(B)(v), sibling relationship exception to adoption. L.K. asserts the sibling relationship exception applied because N.K. and M.W. had a strong bond with L.W., their much younger sister.

The sibling relationship exception to terminating parental rights applies when the juvenile court finds there is a compelling reason for finding termination would be detrimental to the child because it would substantially interfere with that child's sibling relationship. (§ 366.26, subd. (c)(1)(B)(v).) Factors to be considered include the nature and extent of the relationship, whether the child was raised with a sibling in the same home and whether the child has strong bonds with a sibling. The court must also consider whether ongoing contact is in the child's best interests, including the child's long-term emotional interest, compared to the benefit of legal permanence through adoption. (*Ibid.*) The purpose of this exception is to preserve long-standing sibling relationships that "serve as anchors for dependent children whose lives are in turmoil." (*In re Erik P.* (2002) 104 Cal.App.4th 395, 404.)

"The sibling relationship exception contains strong language creating a heavy burden for the party opposing adoption." (*In re Daniel H.* (2002) 99 Cal.App.4th 804, 813.) Similar to the beneficial parent-child relationship exception of section 366.26, subdivision (c)(1)(B)(i), application of the sibling relationship exception requires a balancing of interests. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 951.) The parent must first show: (1) the existence of a significant sibling relationship; (2) terminating parental

rights would substantially interfere with that relationship; and (3) it would be detrimental to the child if the relationship ended. (*Id.* at p. 952.) After the parent shows a sibling relationship is so strong that its severance would be detrimental to the adoptive child, the court then decides whether the benefit to the child of continuing the sibling relationship outweighs the benefits of adoption. (*Id.* at pp. 952-953; *In re Naomi P.* (2005) 132 Cal.App.4th 808, 823.)

Our standard of review is the substantial evidence test. (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at p. 953.) N.K. and M.W. are likely to be adopted by the same family and, thus, terminating parental rights will not affect their sibling relationship with each other. As to L.W., she had not lived with N.K. and M.W. The older girls knew L.W. only through their visits with L.K. and family gatherings. After L.K.'s visits became supervised, she visited N.K. and M.W. less frequently and, thus, the number of encounters that the older girls had with their young sister dwindled. We acknowledge that N.K. and M.W. thoroughly enjoyed their visits with L.W. However, the only evidence before the court that N.K. and M.W. would be adversely affected if their sibling relationship with L.W. ended was L.K.'s testimony that the older girls would be "heartbroken" if they could no longer see L.W. This was an insufficient showing of detriment under section 366.26, subdivision (c)(1)(B)(v). (*In re L.Y.L.*, at pp. 952-953.) "Many siblings have a relationship with each other, but would not suffer detriment if that relationship ended. If the relationship is not sufficiently significant to cause detriment on termination, there is no substantial interference with that relationship." (*Id.* at p. 952.)

Further, the evidence supports a finding that the benefit to N.K. and M.W. of continuing the sibling relationship with L.W. was outweighed by the benefits the older girls would realize through adoption. N.K. and M.W. thrived in the stable household of the aunt and her son. The girls' need for competent, caring and stable parents is paramount, and could be realized only through the permanency of adoption. (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at p. 950; *In re Megan S.* (2002) 104 Cal.App.4th 247, 252.) The sibling relationship with L.W. was not sufficiently significant to constitute a "compelling reason" (§ 366.26, subd. (c)(1)(B)) to order a permanent plan other than adoption for N.K. and M.W. (*Id.*, subd. (c)(1)(B)(v).)

Moreover, adoption will not sever all ties between the older girls and L.W. The social worker reported the aunt and her son "[were] committed to keeping [N.K. and M.W.] connected to [their birth] family." Substantial evidence supports the court's finding the beneficial sibling relationship exception did not apply to preclude terminating L.K.'s parental rights. (*In re Celine R.* (2003) 31 Cal.4th 45, 61-62.)

### III. *Guardians' Awareness of Legal Ramifications of Adoption*

L.K. contends the juvenile court selected adoption as N.K. and M.W.'s permanent plan without sufficient evidence the aunt was aware of the legal ramifications of adoption in contrast to guardianship.

Section 366.21, subdivision (i)(1)(D), provides that the adoption assessment report shall include an "assessment of the eligibility and commitment of any identified prospective adoptive parent or legal guardian, including . . . the understanding of the

legal and financial rights and responsibilities of adoption and guardianship." L.K. complains that the adoption assessment report stated the aunt understood the rights and responsibilities of adoption, "but provides no factual underpinning to support that conclusion."<sup>3</sup>

Our review of the record shows there was more than adequate evidence the aunt understood the legal distinctions between adoption and guardianship. Agency social workers twice explained the distinctions between guardianship and adoption to the aunt because there were two selection and implementation hearings.

Before the section 366.26 hearing in early 2010, the social worker explained both permanent plans to the aunt. A social worker reported to the court the aunt understood both permanent plans, including the legal and financial rights and responsibilities of both plans. At that time, the aunt preferred a guardianship principally because she hoped that L.K. would eventually gain the needed stability in her life and be able to regain custody of N.K. and M.W. Agency recommended guardianship as the permanent plan because L.K. and the girls had a beneficial parent-child relationship. The court adopted Agency's recommendation.

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<sup>3</sup> Agency argues that L.K. has forfeited the right to challenge the adoption assessment report on appeal because she did not make a timely objection below. (*In re Crystal J.* (1993) 12 Cal.App.4th 407, 411-412.) To the extent that L.K. is attacking the assessment report, we agree such an argument is waived. However, L.K. asserts she is not raising the adequacy of the assessment report, but simply asserting there was insufficient evidence before the court that the aunt understood the difference between guardianship and adoption.

N.K. and M.W. had problems adjusting to the aunt's structured household after visits with L.K. and other maternal relatives who were lax in supervising and disciplining the girls. N.K. and M.W. displayed defiant and aggressive behavior toward the aunt and her son. After the aunt decided visits with L.K. and the relatives had to be supervised, the number of visits declined and the girls' behavior improved. They also performed better in school.

In September 2010, the aunt and her son asked Agency for additional information about adoption. They had become disillusioned with L.K.'s "inconsistency and instability . . . and the impact it had on the girls." The social worker said the aunt and her son "expressed their desire to provide [N.K.] and [M.W.] with a permanent, stable, loving home." In a status review report dated October 28, 2010, the social worker wrote: "The relative caregivers have observed the transformation by the girls and want to ensure they can have this consistency and stability for the rest of their lives. After careful review of the benefits and differences of adoption and guardianship, the legal guardians determined that they wanted to provide [N.K.] and [M.W.] with a permanent and loving home."

Moreover, in a December 7, 2010, addendum report, the social worker said that during a recent interview the aunt and her son reiterated their decision to proceed with adoption. "The relative caregivers indicated they believed they had made an informed decision after reviewing all of the information provided as well as having multiple discussions with the undersigned," wrote the social worker.

Therefore, assuming, without deciding, the adoption assessment report was conclusory about the relative caregivers' understanding of the responsibilities of adoption as well as the legal and financial rights of adoption, we find the record contains substantial evidence to support that conclusion.<sup>4</sup>

#### DISPOSITION

The judgment is affirmed.

MCDONALD, J.

WE CONCUR:

NARES, Acting P. J.

MCINTYRE, J.

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<sup>4</sup> L.K. contends reversal is required because of the cumulative effect of the juvenile court's errors. When no individual error occurs, there cannot be cumulative error. "The zero effect of errors, even if multiplied, remains zero." (*People v. Calderon* (2004) 124 Cal.App.4th 80, 93.)